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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

THOMAS CONYERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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Since the filing of our brief in opposition, the New York Court of Appeals has rendered an opinion in which three members of the majority in this case referred to their opinion as being based on an interpretation of the State Constitution independent of the Federal Constitution. That opinion further supports our argument that this Court is barred from reviewing the decision below by the doctrine of adequate and independent state grounds. Moreover, it refutes Petitioner's argument that "by amending the remittitur, the New York Court of Appeals was expressly stating that the reversal was mandated by the Federal Constitution and the reversal did not rest on any independent state ground." Petitioner's Reply, p. 2.

In People v. Savage, ____ N.Y.2d ____ [slip op., July 3, 1980],* the New York Court of Appeals held that a defendant who has been given Miranda warnings and has waived his right to

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* Annexed hereto as an Appendix.

silence by giving a narrative of his criminal involvement may be cross-examined at trial on his failure to inform the police at that time of the exculpatory circumstances to which he later testifies. Writing for the court, Judge Fuchsberg, who was a member of the majority in this case, concluded that Savage presented a situation fundamentally different from that presented in Doyle v. Ohio, 426 U.S. 610 (1976), because Savage did not remain silent after being given his Miranda warnings. Hence, he made no reference to this case.

In his dissent in Savage Judge Gabrielli, who authored the court's opinion in this case, joined by Judge Wachtler, who also had been a member of the majority in this case, argued that the impeachment should not have been permitted. The following reference is made to the court's opinion in this case:

> We also held in Conyers that use of silence, even for impeachment purposes only, was improper under both the Federal and State Constitutions regardless of whether the defendant has actually been given his Miranda warnings. Recently, the Supreme Court in Jenkins v. Anderson (48 USLW 4693), has indicated that if the defendant is not given Miranda warnings and does not otherwise specifically indicate that he is relying upon his right to remain silent, the use of that silence for impeachment purposes is not violative of the Federal Constitution. This holding, however, does not vitiate the conclusion we reached in Conyers that such cross-examination is violative of our State Constitution. In any event, since Savage was given Miranda warnings, Jenkins is not relevant to this appeal.

Id. slip op. p. 3, f.n. 1. Chief Judge Cooke, also a member of the majority in this case, similarly characterized the court's opinion in this case in his concurring opinion in Savage. Id. Cooke, Ch. J. (concurring).

In sum, three of the four judges comprising the majority in this case clearly expressed the view in Savage that the court's opinion in this case, in which the state constitution was explicitly relied upon, was based on independent state grounds. Since the fourth member of the majority in this case

authored the Court's opinion in Savage and did not contest that interpretation, it can be assumed that he agreed. Thus, the Amendment of the remittitur simply reflects the alternative grounds for the decision below or the court's interpretation of similar, but independent provisions of the State and Federal Constitutions. Under these circumstances the Petition should be denied. At the very least, the case should be remanded to determine whether the view expressed by three members of the court below that their decision in this case was based on independent state grounds represents the view of the court. See California v. Krivda, 409 U.S. 33 (1972).

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED OR THE CASE REMANDED FOR CLARIFICATION.

Respectfully submitted,

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July 15, 1980

State of New York
Court of Appeals

1 No. 300
The People &c.,
Respondent,
v.
James Savage,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(300)Bennett M.Lincoff & William E. Hellerstein, NY Legal Aid, for appellant.
Mario Merola,DA,Bronx County(Laurence J. Lebowitz & Billie Mannin of counsel) for respondent.

FUCHSBERG, J.:

The question on this appeal is whether a defendant who, having been given the warnings required by Miranda v Arizona (384 US 436) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial. We hold that, under the circumstances here, neither due process nor the privilege against self-incrimination prohibits this manner of impeachment.

Defendant James Savage appeals from an order of the Appellate Division which affirmed a judgment entered upon a jury verdict convicting him of first degree assault. The conviction flowed from his

shooting of one Robert Johnson in the course of an altercation outside the Central Bar on East 161st Street in the Bronx. At the trial several witnesses for the People, including Johnson, testified that Savage had drawn his gun and purposely shot Johnson. One of the prosecution's witnesses, the arresting officer, testified that several weeks after the crime had been committed, when he apprehended the defendant, immediately after the administration of the Miranda warnings, the defendant volunteered, first,"I'm glad I'm caught -- I'm tired" and then went on to describe his role in the shooting, confessing that he had shot Johnson with a gun he possessed during an altercation outside the bar. Significantly, to the prosecutor's additional inquiry, made without objection,as to whether the defendant had "indicate[d] anything further to you apart from what you've just stated", the officer's response was "no".

Thereafter, during his own case, the defendant, choosing to take the stand, testified that he indeed had shot Johnson and then added by way of justification that the shooting had occurred during an altercation precipitated when Johnson attempted to rob him. He also told the jury that the actual discharge of the gun was inadvertent. On cross-examination the prosecutor, in an obvious attempt to establish that the exculpatory material was a recent fabrication, essayed and, over objection, was permitted to put a short series of questions at the heart of which was the one that reads: "Now, when you saw Detective Creegan [following the arrest], before you saw your lawyer, when you saw the police officer, did you tell the police officer that [Johnson] attempted to rob you?" The defendant's response was that he had done so. As might be expected, during the course of his summation, the District Attorney, in arguing that the detective's version of the post-Miranda statement was more credible, made the point that, if it was, the fact that the defendant had omitted any mention of the exculpatory circumstance at the time of his original statement militated against its truth.

In our view, the prosecutor's queries to the defendant were proper and, therefore, so were the comments made in closing argument.

It is by now well-settled that the use of his post-arrest silence against a defendant even for impeachment purposes may violate due process and the privilege against self-incrimination. In Doyle v. Ohio (426 US 610), fundamental fairness forebade a prosecutor to attempt to draw an adverse inference from the fact of a defendant's silence at the time of arrest because the defendant's receipt of the Miranda warnings had, in effect, conveyed the State's assurance that, if he elected to remain silent, his silence would not be used against him (id., at 617,619; see Jenkins v Anderson, __US __,48 USLW 4693, 4696 [June 10, 1980]). Having been told he need not speak about the facts of the case at that time, the State cannot renege on its promise and use the silence to impeach him when he subsequently testifies at trial. Moreover, viewed against the obvious prejudice, the use of a defendant's silence at a time when he was privileged to say nothing at all was recognized to be of dubious probative value because it cannot be determined whether, in fact, it was the existence of the privilege that induced the silence. (Doyle v. Ohio, supra, at 617,618; see People v. Rutigliano, 261 NY 103,107.)

However, as the Supreme Court has even more recently made clear, a defendant, who, in the face of Miranda warnings, decides not to exercise his privilege but instead chooses to speak to the police about the charges against him, enjoys no due process protection from such an inquiry (see Jenkins v. Anderson, supra, p 4696; Anderson v Charles, __US__, 48 USLW 3819 [June 16, 1980]). Rather, whether he may be impeached by the use of telling omissions from the tale he told is to be determined under State evidentiary law (Jenkins v. Anderson, supra, p 4696; cf. People v. Dawson, __NY2d __slip op at 13-14 [dec'd May 6, 1980]).

Against this backdrop, the case before us emerges as fundamentally different from Doyle (supra). For, the simple and undeniable fact is that the defendant here did not remain silent. In stark contrast to the circumstances in Doyle, where the defendants "did not speak about the facts

of the case at the time" when the silence there occurred (426 US at 619, as reiterated in Jenkins v. Anderson, supra, p 4694), the most cursory examination of the record reveals that Savage, for all practical purposes, did just the opposite.

As already indicated, the direct testimony of the arresting officer established that Savage, without any overbearing of his will, responded to the opportunity to inform the officer of his involvement in the crime. Moreover, this he did in no conclusory form. A breakdown of his statement proves that he specifically stated that he possessed a pistol, that he used the weapon to shoot Robert Johnson, that the shooting occurred in the course of a dispute between him and Johnson, that the shooting took place in front of a bar and that the bar was located on 161st Street. Not only were these relevations incriminatory, they expressly incorporated essential elements of the crime with which he was to be charged. But excluded from all this was the crucial exculpatory circumstance to which the defendant later was to testify -- that he had shot his victim unintentionally while warding off the latter's attempt to rob him.

Given defendant's voluntarily rendered narrative of his part in the shooting, this omission speaks more eloquently than words. For, what was omitted is far from an inconsequential detail or a collateral matter, but a fact of such overwhelming significance that its absence from the narrative was at least as calculated to distort his recitation as a most affirmative falsehood. It put an entirely different cast on the event.

It is an elementary rule of evidence, and of common sense, in our State and almost every other jurisdiction, that, when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of impeachment (3A Wigmore, Evidence [McNaughton rev ed], §1042; Richardson on Evidence [Prince-10th ed], §222). This rule is firmly imbedded in behavioral

expectations (cf. People v. Dawson, supra).

Therefore, that the defendant decided not to offer the mitigating explanation for his conduct in amelioration of his role in the shooting he undertook to describe could challenge credulity. Having on his own ventured to communicate devastatingly incriminating information, his failure to then so much as mention the excuse he was later to put forth is well-nigh inexplicable except as a recent fabrication. Measured by the way in which almost any normal person would perceive it, the strongest considerations of self-interest would be expected to keep him from containing it within himself. In short, his conduct ran counter to human experience. And further confirmation of its significance comes from the setting in which the omission occurred: that moment of psychological truth when a defendant chooses to inculpate himself, "that moment [when] he will tell all, and tell it truly" (3 Wigmore, Evidence [Chadbourn rev ed], §851, p 524).[1] Thus, the exclusion, however it might be weighed by the triers of the facts, was, to say the least, extraordinarily probative in enabling them to evaluate the reliability of the explanation when it surfaced for the first time at trial.

Moreover, reference to the omission, because of its negative nature, could not serve substantively as evidence in chief to prove the commission of the crime. It did not lend itself to employment, whether by way of evidence or argument, as anything more than a device for impeachment (compare United States v Agee, 597 F2d 350,354,357, cert denied __US __, with id., at 365-368 [dissenting opinion]).[2]

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1. The weighty experiential support for this principle, Professor Wigmore has noted, has been recognized by masters of psychology as varied as Honore Balzac and Daniel Webster (3 Wigmore, Evidence [Chadbourn rev ed] §851, p 524, n 2).

2. It is also worth mention that the prosecutor's question in any event could have had no more than cumulative effect; the juxtaposition of the inclusion of the exculpatory matter in the defendant's own testimony, on the one hand, and its absence from the officer's recounting of his post-arrest conversation with the defendant, on the other, could hardly have been lost on the jury. Moreover, defense counsel's failure to object to the pertinent questions put to the officer as to the completeness of the post-Miranda statement only emphasizes that the contrast between the policeman's version and that the defendant was to give was bound to introduce a full-blown impeachment issue even if the defendant had not been cross-examined at all.

Such an analysis fully grants the respect to be accorded a defendant's constitutional rights, whether in the exercise of his privilege against self-incrimination or to the process that is his due. But, doing so, it also recognizes that the intent behind the privilege against self-incrimination, exemplified by the supportive Miranda procedures it has spawned, is not to induce silence but only to insure that the choice to speak is free and uncompelled (see ALI, Model Code of Pre-Arraignment Procedure, pp 168-174). That it was so in the case before us now is unchallenged. There is not the slightest suggestion that government action, passive or active and whether via the Miranda warnings or otherwise, induced the omission. If anything, it can be said that the warnings provided him with a ready means by which to rationalize the omission at trial (see Doyle v. Ohio at 626 [Stevens, J., dissenting]).

In striking the balance these principles bespeak, the State is denied the right to draw adverse inferences from the fact that a defendant has maintained an effective silence, even if something less than total. However, as we have seen, constitutional standards do not inhibit every use of a defendant's post-arrest silence, but only those which are fundamentally unfair (Doyle v. Ohio, supra, at 618,619-620 & n 11; United States v. Conlin, 551 F2d 534, cert denied 434 US 831 [to rebut defendant's claim that he told exculpatory version to police after his arrest]; cf. Jenkins v. Anderson, __US __, 48 USLW 4693, 4696,and 4698 n 1 [Marshall, J.,dissenting] [use of prearrest silence to impeach defendant's credibility]; Roberts v. United States, __US __, 48 USLW 4370, 4371-4372 and 4372-4373 [Brennan, J., concurring] [refusal of defendant to answer questions about co-conspirators held to permit increased sentence]; United States v. Trujillo, 578 F2d 285,287-288 [post-arrest silence may be pertinent to claim of insanity]).

Thus,as Doyle teaches,courts may not overlook the obvious fact that post-arrest silence will often be "insolubly ambiguous" since it may be impossible to determine whether the defendant was motivated to remain silent in the

exercise of his Fifth Amendment privilege or, for example, because he then possessed no acceptable explanation for the conduct for which he was in custody. But, in a case like the one before us today, where we deal with a defendant who did not stand mute, even-handed logic dictates that time-tested evidentiary procedures for the ascertainment of truth not be ignored (Anderson v. Charles, __US__, 48 USLW 3819).[3]

Surely, that is true as to a defendant who, instead of invoking his right to silence, "chooses to speak in the unfettered exercise of his own will" (Miranda v Arizona, 384 US 436,460) and, in so doing, speaks pertinently to the criminal accusation against him. When, as in the present case, the defendant, though alerted to his rights by the officer, is ready enough to make an almost cathartic confessional of both his relief at being apprehended and the role he played in the shooting itself, he manifests an unmistakable "decision to cast aside his cloak of silence" and thus should not now be permitted to forestall impeachment of his credibility with the cavalier claim that he did not so intend (Jenkins v. Anderson, supra, at 4695).

That this case does not fit into the analytical mold of Doyle is also apparent from the fact that the dissenters must indulge in the utterly unwarranted presumption that the defendant, whom the Miranda warnings did not deter from revealing his leading part in the criminal transaction, suddenly thought the better of it and refused to say anything more in reliance on the privilege which until that instant he had completely ignored. Putting aside the fact that nothing in the record supports this tenuous assumption, such an approach must proceed on the peculiar premise that the defendant would unnaturally have halted his speech solely to withhold the one thing he normally would want to put up front, his exculpatory explanation.

3. It goes without saying that, in such circumstances, the trial court, exercising its authority to supervise the cross-examination (see People v. Ocasio, 47 NY2d 55,60), may be expected to apply standards like those we enunciated in People v. Dawson (__NY2d __, dec'd May 6, 1980), adjusted of course, for the differences between a witness in the position of the one in that case and of a defendant in a case like the present one. Thus, for example, the court should, if requested, advise the jury that the defendant was under no legal obligation to have continued speaking, and should permit the defendant the opportunity to tender explanation for his omissions.

This being so, it is noteworthy that other courts, interpreting Doyle in like circumstances, also have sanctioned the impeachment of a defendant's credibility by confronting him with logically significant omissions from a post-arrest statement (see,e.g., United States v. Agee, 597 F2d 350, 354-357 [3rd Cir]; United States v Mireles, 570 F2d 1287, 1291-1293 [5th Cir]; Twyman v Oklahoma, 560 F2d 422, 424 [10th Cir], cert. denied 434 US 1071; United States v. Mitchell, 558 F2d 1332, 1334, 1335 [8th Cir]).

Most important, misapplication of the protective principles these cases endorse in the long run would but serve to undermine rather than advance the values protected by the privilege against self-incrimination and due process. For nothing saps the strength of a legal precept more than when, as put into practice, it turns out to have an unanticipated, unrealistic and undesirable effect.

For all these reasons, the order of the Appellate Division must be affirmed.

People v Savage

Case #300

COOKE, Ch. J. (concurring):

I concur in the result in this case. I write, however, because I believe that the majority's studied silence on the matter overrules our recent decision in People v Conyers (49 NY2d 174). There, relying on both the Federal and State Constitutions, we held that defendant's post-arrest silence could not be used against him, even in the absence of Miranda warnings. This rule was founded on the State's implied promise not to use against a defendant the constitutionally guaranteed right to remain silent and on the rationale that it would be fundamentally unfair to permit the State to renege on that promise by later using that silence against him (People v Conyers, supra, at 179-180). Both due process and the privilege against self-incrimination (NY Const, art 1, §6) prevented use of defendant's post-arrest silence for impeachment purposes. Moreover, we recognized the weak probative value of post-arrest silence given its inherent ambiguity (id. at 181-182). In contrast to Conyers, the instant case does not involve post-arrest silence. Defendant here freely chose to speak. Thus, Conyers is inapplicable. Since Jenkins v Anderson (___US___, 48 USLW 4693) does not compel a different approach to that adopted in Conyers, I cannot join the majority opinion in this respect.

People v Savage
Case #300

GABRIELLI, J. (dissenting):

Pursuant to well-established legal precedent, I am compelled to dissent and vote to reverse the order of the Appellate Division. Simply stated, the People were improperly permitted, over a timely objection, to question defendant about his failure to provide the police at the time of his arrest with every detail of the explanation for his conduct that he subsequently asserted at trial. Since there existed no actual inconsistency between what defendant told the police following his arrest and his testimony at trial, cross-examination concerning defendant's partial silence at the time of his arrest is violative of due process (People v Conyers, 49 NY2d 174; Doyle v Ohio, 426 US 610; cf People v Dawson, ___ NY2d ___, decided May 1, 1980).

In the early morning hours of January 4, 1977, defendant shot one Robert Johnson in the abdomen during an altercation with Johnson on the sidewalk outside the Central Bar at East 161st Street and Morris Avenue in the Bronx. Fortunately, the injury was not fatal. Savage was arrested for the crime several weeks later, and after being given the warnings mandated by Miranda v Arizona (384 US 436), defendant told police that he was glad he had been arrested, because he was "tired". He also admitted that he had shot Johnson outside the Central Bar, but he otherwise gave no details about the incident at that time, according to the trial testimony of the officer to whom those statements were made. At defendant's trial, Johnson and several other witnesses testified that defendant had drawn his gun and purposely shot Johnson during an argument. Defendant testified on his own behalf. He admitted shooting Johnson, but sought to justify his action, asserting that Johnson had assaulted him and was attempting to rob him. Defendant claimed that he drew the gun in the hope of frightening off Johnson and without any intention of actually using it, but that the gun accidentally discharged in the scuffle.

On cross-examination, the court permitted the prosecutor to ask defendant the following question over a timely defense objection: "Now, when you saw Detective Creegan [following the arrest], before you saw your lawyer, when you saw the police officer, did you tell the police officer that he [Johnson] attempted to rob you?" Since the officer had already testified on direct that defendant had simply admitted shooting Johnson and had not made any other statements following his arrest, this question was obviously intended to impeach defendant's exculpatory testimony at trial by suggesting that it was a recent fabrication. Interestingly, however, defendant responded that he had in fact told the officer his version of the incident. The prosecutor was then permitted to cross-examine defendant at some length about the discrepancy thus revealed between the testimony of the officer and that of defendant concerning the statements defendant had made to the officer. For reasons that follow I am constrained to conclude that it was error to allow the People to question defendant about his failure to tell the police his version of the facts following his arrest. Hence, there should be a reversal and a new trial.

It has long been the law in this State that a defendant's silence following his arrest may not be used against him as evidence of guilt (People v Rutigliano, 261 NY 103). Although at one time it was permissible to use the defendant's silence as a means of impeaching his in-court testimony on the ground that it was a recent fabrication (see People v Rothschild, 35 NY2d 355), that exception to the general prohibition against the use of a defendant's silence was sharply curtailed by the Supreme Court in Doyle v Ohio (426 US 610). It was held in Doyle that a defendant who remains silent after being given his Miranda warnings may not subsequently be questioned, even for the limited purpose of impeachment, concerning that silence. Thereafter, in People v Conyers

(49 NY2d 174, 180, supra) we recognized that under both the Federal and New York State Constitutions, "the use for impeachment purposes of an accused's silence at the time of his arrest is violative of due process".[1] I consider this principle, which a fortiori is applicable to the assertion of the right to silence following an arrest (see Doyle v Ohio, 426 US 610; see also People v Conrow, 200 NY 356, 367-369), to be dispositive of the instant appeal. Quite simply, the question quoted above constituted an attempt to use defendant's post-arrest silence to impeach his trial testimony by suggesting that his failure to tell the police his version of events following his arrest implied that it was a recent fabrication. As such, it falls within the bar against such cross-examination enunciated in Doyle and in Conyers.

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1. We also held in Conyers that use of silence, even for impeachment purposes only, was improper under both the Federal and State Constitutions regardless of whether the defendant has actually been given his Miranda warnings. Recently, the Supreme Court in Jenkins v Anderson (48 USLW 4693), has indicated that if the defendant is not given Miranda warnings and does not otherwise specifically indicate that he is relying upon his right to remain silent, the use of that silence for impeachment purposes is not violative of the Federal Constitution. This holding, however, does not vitiate the conclusion we reached in Conyers that such cross-examination is violative of our State Constitution. In any event, since Savage was given Miranda warnings, Jenkins is not relevant to this appeal.

The majority conclude that the instant case is distinguishable from Doyle and Conyers because the defendants in those cases said little or nothing to the police at the time of arrest, whereas Savage did admit that he had shot Johnson. I do not find this factual distinction to be constitutionally significant in this context. The majority impliedly suggest that a defendant who once waives his right to remain silent by speaking to the police must then either continue to speak or subject himself to cross-examination concerning his subsequent silence. I am unable to agree with that and cannot concur in the majority's decision to so neatly separate the initial assertion of the right to remain silent from any subsequent exercise of that right. A defendant who does begin to speak to the police has the absolute right to cease speaking at any time and thereby impliedly reassert his right to be silent, and no compulsion, however subtle, may be employed to persuade such a defendant to continue speaking. One who makes an admission to the police does not thereby assume any obligation to volunteer further information, and the failure to do so may not serve as a basis for discrediting a subsequent explanation. This is so because the decision to refrain from giving complete details to the police, like the decision not to speak to the police at all, must be deemed an assertion of the defendant's right to remain silent. Since the State has impliedly promised every defendant that it will not use his silence against him, it would be fundamentally unfair to nonetheless allow the assertion of that right to be used even for impeachment purposes only (see People v Conyers, supra).

Clearly distinguishable are those cases in which a defendant at or following his arrest actually makes a statement which is inconsistent with his later testimony at trial.[2] In such a situation, the prosecution is free to use that inconsistency for impeachment purposes, even if the statement would be inadmissible on the prosecution's direct case because it was obtained without first providing the suspect with the mandatory Miranda warnings (People v Wise, 46 NY2d 321; People v Harris, 25 NY2d 175, aff'd 401 US 222). There exist several reasons why a testifying defendant may be impeached by inconsistent statements obtained in violation of Miranda but not by his assertion of his right to refrain from speaking to his accusers. First, while the State promises a defendant that it will not use his silence against him and may not subsequently renege on that assurance, no similar promise is made with respect to a defendant's voluntary statements, even if obtained in violation of Miranda. Hence, there exists no fundamental unfairness in allowing the latter to be used for impeachment purposes. Moreover, a direct inconsistency is of much greater probative value than is a defendant's complete or partial silence. Furthermore, "a defendant's decision to

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2. The People also suggest that the instant case does present an actual inconsistency in that the defendant told the officer following his arrest that he had shot Johnson during a "dispute", whereas at trial defendant testified that he had shot Johnson during an attempted assault and robbery. I find this particular argument unpersuasive, for two reasons. First, there does not appear to be any necessary contradiction between the two accounts. That the"dispute" between defendant and Johnson was caused by a robbery attempt does not make it any less of a "dispute". Moreover, the police officer did not specifically testify that the defendant actually used the word "dispute" to describe the incident; rather, that term was supplied by the prosecutor (cf Anderson v Charles, ___ US ___, 48 USLW 3819).

remain silent at the time of arrest is in and of itself an assertion of a basic constitutional privilege. Thus, to allow that silence to be used against a defendant is to place a burden upon the direct exercise of a fundamental right. The Miranda warnings, on the other hand, constitute a prophylactic device designed to prevent constitutional violations and to protect the rights of an accused. In the absence of any actual coercion, a statement made by a defendant who has not been informed of his rights is not inherently suspect, nor does the use of such a statement against a defendant penalize that defendant for the exercise of a constitutionally protected right"(People v Conyers, supra, 49 NY2d at 182-183). In sum, whenever the alleged inconsistency arises not from the defendant's words, but from his failure to speak fully at a time when he was privileged to refrain from speaking at all, the prosecution may not use that claimed inconsistency to impeach the defendant's trial testimony.

This is not to suggest that a defendant may never be cross-examined as to his failure to speak. Certainly, if the defendant himself puts the matter in issue, the trial court would not abuse its discretion by allowing the People to pursue the subject. For example, if a defendant on direct examination, or even in response to a legitimate prosecution query during cross-examination, were to testify that he told his exculpatory version of the facts to the police, the prohibition against the use of defendant's silence would not apply. In such a case, the trial court would be empowered not only to allow cross-examination of the defendant on this point (see Doyle v Ohio, supra, 426 US at 619-620, n 11), but also to permit the People to provide direct evidence to the contrary in rebuttal (see also People v Wise, supra, 46 NY2d at 328). This is so because a defendant who is allowed, whether properly or not, to buttress his exculpatory trial testimony

in such a way (see Richardson, Evidence [10th ed], § 519) creates an issue concerning the exact extent of his statements to the police and thereby opens the door to an inquiry which would otherwise be forbidden. In short, if a defendant seeks to rely on a claim that he made certain statements to the authorities, the prosecution normally should be free both to attempt to disprove the existence of those statements and to explore the circumstances surrounding their purported utterance.

No such exception to the general bar against use of a defendant's silence is applicable to the instant case, for here the entire issue arose as a result of an improper prosecution attempt to use defendant's post-arrest silence to discredit his exculpatory trial testimony. It is true that defendant did eventually testify that he had told the officers his exculpatory story. Hence, in accord with the principle discussed above, had such a statement been made either on direct or in response to permissible cross-examination, the People legitimately could have sought to pursue the matter. As it is, however, this statement was elicited by the prosecution in the course of a wholly improper inquiry and accordingly cannot serve to justify that examination nunc pro tunc. The legitimacy of a particular line of cross-examination must be judged prospectively, not retroactively, in the sense that testimony obtained during a particular line of questioning may not be used as an ex post facto justification for that very line of inquiry if it was clearly improper at the time it was commenced. Thus, in the instant case, the fact that the prosecution's improper cross-examination ultimately elicited testimony which could itself have served as a basis for legitimate cross-examination had it been made in a different context, does not negate the undeniable fact that the trial court erred in allowing that initial inquiry (cf United States v Maverick, 601 F2d 921

Nor do I find any merit in the People's additional contention that the error in allowing the prosecution to cross-examine Savage about his silence was harmless. Although there was considerable evidence of guilt, there nonetheless remained a question of credibility for the jury as to the conflicting testimony concerning the details of the dispute between defendant and Johnson. In such a case, the assault upon defendant's credibility may well have played a significant part in the jury's ultimate determination that defendant was guilty. Especially is this true in light of the prosecutor's summation, which emphasized defendant's failure to tell the police his version of the facts following his arrest. Thus, I must conclude that there does exist a reasonable possibility that this constitutional error contributed to defendant's conviction (see People v Crimmins, 36 NY2d 230).

In light of my conclusion that defendant is entitled to a new trial on this ground, I deem it unnecessary to consider any of defendant's other contentions.

Accordingly, I vote to reverse the order appealed from and to remit the case to Supreme Court, Bronx County, for a new trial.

* * * * * * * * * * * * * * * *

Order affirmed. Opinion by Fuchsberg, J. All concur, Cooke, Ch.J., in a separate opinion; except Gabrielli, J., who dissents and votes to reverse in an opinion in which Wachtler, J., concurs.

Decided July 3, 1980